Supreme Court, U.S.
FILED
JUL 11 2000
CLERK

(2)

No. 99-1993

IN THE

Supreme Court of the United States

MASTER FINANCIAL, INC.,

Petitioner,

v.

STEPHEN McDONALD, *et ux.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

DEXTER K. CASE
Attorney for Respondents
THE LAW FIRM OF
DEXTER K. CASE
541 Court Street
Reading, PA 19601
(610) 372-9900

160831

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Reasons for Denying the Writ	1
I. No Basis For Exercise Of Court's Supervisory Powers.	1
II. No Basis For Exercise Of Court's Important Federal Question Powers.	2
A. Third Circuit's Decision Does Not Conflict with Either 11 U.S.C. § 1322(b)(2) or *Nobelman*	2
B. Third Circuit's Decision Does Not Conflict with *Dewsnup*.	4
III. Public Policy; Congressional Intent	5
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

Bartee v. Tara Colony Homeowners Association, et al., 2000 WL 621400 (5th Cir.) (To be reported at 212 F.3d 277) ..... *passim*

Dewsnup v. Timin, 502 U.S. 410, 112 S. Ct. 773 (1992) 1, 4

First Union Mortgage Corporation v. Eubanks (In re Eubanks), 219 B.R. 468 (6th Cir. BAP 1998) 6

In re Bellamy, 962 F.2d 176 (2d Cir. 1992) 4

In re Cervelli, 213 B.R. 900 (Bankr. D.N.J. 1997) 5

In re Lam, 211 B.R. 36 (9th Cir. BAP (Cal.) 1997), *appeal dismissed*, 192 F.3d 1309 (9th Cir. 1999) 2, 5

In re Perry, 235 B.R. 603 (S.D. Tex. 1999) 6

McDonald v. Master Financial, Inc., 205 F.3d 606 (3d Cir. 2000) ..... *passim*

Nobelman v. American Savings Bank, 508 U.S. 324, 113 S. Ct. 2106 (1993) ..... *passim*

Cited Authorities

	Page
Sapos v. Provident Institution of Savings in the Town of Boston, 967 F.2d 918 (3d Cir. 1992)	4
United States v. Ron Pair Enterprises, Inc., 109 S. Ct. 1026 (1989)	2
Statutes:	
11 U.S.C. § 362	3
11 U.S.C. § 506(a)	2, 3
11 U.S.C. § 506(d)	4
11 U.S.C. § 1322(b)(2)	2, 3, 5, 6
11 U.S.C. § 1322(b)(5)	3
11 U.S.C. § 1322(c)(2)	6

REASONS FOR DENYING THE WRIT

Master Financial, Inc.'s ("Master Financial") petition should be denied because there is no conflict among the United States Circuit Courts of Appeal on this issue nor has the Third Circuit's decision in this case decided an important federal question that was either undecided by or conflicts with other decisions of the United States Supreme Court.

I. NO BASIS FOR EXERCISE OF COURT'S SUPERVISORY POWERS.

Master Financial's contention that "[t]here is a rift between the Circuits and the decision of the United States Supreme Court . . .", *petition* p. 7, assumes that the decision of the Third Circuit in this case and assumedly the recently released Fifth Circuit decision in *Bartee* are in conflict with the Supreme Court's decisions in *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S. Ct. 2106 (1993) and *Dewsnup v. Timin*, 502 U.S. 410, 112 S. Ct. 773 (1992). *See McDonald v. Master Financial, Inc.*, 205 F.3d 606 (3d Cir. 2000); *Bartee v. Tara Colony Homeowners Association, et al.*, 2000 WL 621400 (5th Cir.) (To be reported at 212 F.3d 277).

Although there is a split in the decisions among the bankruptcy and district courts on the issue of whether or not a chapter 13 debtor may strip off a wholly unsecured lien secured only by the debtor's residence, a majority of the courts deciding this issue have been consistent with the decisions in *McDonald* and *Bartee*. *See McDonald*, 205 F.3d at 610, n.2, 3 (citing cases both pro and con with the greater number being pro); *See also Bartee*, 2000 WL 621400

at 8, n.15 ("If we err in our view, we are in good company.") (Citing numerous lower court decisions that are consistent with its view).

The only bankruptcy appellate panel to hear this matter is the Ninth Circuit BAP. Its decision preceded and is consistent with *McDonald* and *Bartee*. *In re Lam*, 211 B.R. 36 (9th Cir. BAP (Cal.) 1997), *appeal dismissed*, 192 F.3d 1309 (9th Cir. 1999). The Third and Fifth Circuit Courts of Appeal are the only Circuits to have decided this issue. Since both the Third and Fifth Circuits agree that stripping off a wholly unsecured mortgage lien is not contrary to the decision reached in *Nobleman*, there is no conflict among the Circuits.

II. NO BASIS FOR EXERCISE OF COURT'S IMPORTANT FEDERAL QUESTION POWERS.

A. Third Circuit's Decision Does Not Conflict with Either 11 U.S.C. § 1322(b)(2) or *Nobelman*

Section 1322(b)(2) provides that a debtor's chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . ." 11 U.S.C. § 1322(b)(2). This provision, commonly referred to as the "antimodification" provision prohibits a debtor from modifying the rights of a creditor who has a claim secured only by the debtor's principal residence. However, under 11 U.S.C. § 506(a), a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured. *United States v. Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1029 (1989).

Nobleman, teaches that we should apply § 506(a) to a mortgagee's claim before looking to § 1322(b)(2). *Nobleman*, 113 S. Ct. at 2110. It is apparent that Justice Thomas did not consider application of § 506(a) to the mortgagee's claim in *Nobleman* to be an impermissible modification of the mortgagee's rights protected under § 1322(b)(2); if he had, he could have simply accepted the Fifth Circuit's view that § 1322(b)(2) "trumped" § 506(a). *See Bartee*, 2000 WL 621400 at 6. Instead Justice Thomas first applied § 506(a) to the mortgagee's claim and then looked to see what rights of the mortgagee were protected by § 1322(b)(2). Thus § 506(a) is viewed as a statutory limitation that is (similar to § 362 and § 1322(b)(5)) independent of the debtor's plan and therefore outside of the § 1322(b)(2) prohibition. *Nobleman*, 113 S. Ct. at 2110. *See also*, *Bartee*, 2000 WL 621400 at 10 ("... we find no tension between the valuation and claim determination provisions of § 506(a) and the antimodification provision of § 1322(b)(2)").

In *Nobleman*, after applying § 506(a), the Court found that the mortgagee's claim was partially secured and went on to conclude therefore that the mortgagee's rights were protected from modification by § 1322(b)(2). The same is not true in *McDonald*. In *McDonald* as in *Bartee* the lien holder's claim is fully unsecured and therefore Master Financial is not the holder of a secured claim for purposes of § 1322(b)(2). *See Bartee*, 2000 WL 621400 at 10. Consequently the Third Circuit's decision in *McDonald* does not violate either § 1322(b)(2) or *Nobelman*, but is instead both consistent with and "compelled by consideration of the Bankruptcy Code and the *Nobelman* decision." *Id.* at 11.

B. Third Circuit's Decision Does Not Conflict with *Dewsnup*.

Dewsnup v. Timm, 112 S. Ct. 773 (1992) held that § 506(d) could not be used by a chapter 7 debtor to avoid and strip down the undersecured portion of a creditor's lien. The *Dewsnup* Court, recognizing the fact specific nature of its decision, cautioned against extending its holding beyond the specific facts of that case. *Dewsnup*, 112 S. Ct. at 778 ("We therefore focus upon the case before us and allow other facts to await their legal resolution on another day").

Prior to *Nobleman* and apparently undeterred by the Court's admonition, parties in many cases tried to use Dewsnup to argue against lien stripdowns in chapter 13 cases. Prior to *Nobleman*, at least two Circuit Courts of Appeal had decided that *Dewsnup* did not apply to chapter 13 cases. *Sapos v. Provident Institution of Savings in the Town of Boston*, 967 F.2d 918 (3d Cir. 1992); *In re Bellamy*, 962 F.2d 176 (2d Cir. 1992). The Supreme Court's decision in *Nobelman*, deciding the lien stripdown issue in a chapter 13 context without reliance on *Dewsnup*, ended the *Dewsnup* debate in chapter 13 cases.[1]

Consequently, Master Financial's argument to extend *Dewsnup* to this case must fail and the Third Circuit's decision in this case is clearly not in conflict with *Dewsnup*.

---

1. "It is also worth noting that court's are split on whether *Dewsup's* rejection of liens stripping in chapter 7 applies to a wholly unsecured lien . . ." *McDonald*, 205 F.3d at 614-15.

III. Public Policy; Congressional Intent

Master Financial has raised several arguments that can best be described as public policy arguments. The principal policy issue raised in the § 1322(b)(2) debate is whether Congress intended to ". . . unequivocally protect all lending as long as the debt is secured by the debtor's principal residence — regardless of the purpose of the loan . . ." or, "to increase lending for home purchases by providing home mortgage lenders greater protection under the Bankruptcy Code." *Bartee*, 2000 WL 621400 at 11. The minority view supports the contention that Congress intended to provide protection to all lenders in the mortgage lending market, while the majority view supports a distinction between first mortgage lending for home purchases and secondary mortgage lending. *Id* at 11. " 'Because second mortgage[e]s are not in the business of lending money for home purchases, the same policy reasons for protection of first mortgages under § 1322(b)(2) do not exist for second mortgages.' " *Id.* at 11 (*quoting In re Lam*, 211 B.R. at 41).

It is indeed an extreme irony that the Supreme Court's decision in *Nobleman* which has had a significant and substantial impact on debtors' ability to successfully restructure their debt in chapter 13 cases nationwide, arose in the state of Texas where homeowners are constitutionally protected from the predatory lending practices in the secondary mortgage market that pervade much of the rest of the nation. *See In re Cervelli*, 213 B.R. 900, 906, n.9 (Bankr. D.N.J. 1997). It is also widely recognized that protecting the secondary home lending market will only encourage more lenders to intentionally obtain mortgages on already over burdened property in order to avail themselves of this protection. *Id.* at 11 (*citing In re Lam*, 211 B.R. at 41).

"[T]his is not an abstract problem." *Id.* at 11. Today we are seeing increasingly aggressive marketing of home equity loans for purposes other than home improvements. National television commercials regularly proclaim the availability of home equity loans for debt consolidation, relief from credit card debt or virtually any other purpose for up to 125% of the value of the debtor's home. This is certainly not the result that Congress intended when it enacted § 1322(b)(2). The Legislative history of the Bankruptcy Reform Act of 1994 indicates that between 1991 and 1994 both houses of Congress studied ways to decrease the protection of secondary short-term mortgages in chapter 13 cases. *Id.* at 12 (*citing First Union Mortgage Corporation v. Eubanks (In re Eubanks)*, 219 B.R. 468, 473-77 (6th Cir. BAP 1998).

"By enactment of § 1322(c)(2), Congress sought to withdraw antimodification protection from certain classes of 'second mortgages', including 'short-term', high-interest rate home equity loans." *Bartee* at 12 (*citing In re Perry*, 235 B.R. 603, 608 (S.D. Tex. 1999). While § 1322(c)(2) only encompasses short-term mortgages, i.e. those whose final payment is within the term of the debtor's chapter 13 plan, certainly the enactment of this reform provision in 1994, subsequent to the Supreme Court's decision in *Nobelman*, evinces an intent to protect debtor's in those short-term situations even though the lien is secured only by the debtor's principal residence. *Id.* at 12 ("Passage of this exception to § 1322(b)(2) demonstrates that Congress intends to maintain the protection afforded home mortgage lenders, while preventing 'thinly disguised personal' lending from taking advantage of those protections").

Both the *McDonald* and the *Bartee* Circuit Court opinions conclude that their decisions are not only consistent with the law but with public policy as reflected by both Congress and the Supreme Court. *See McDonald*, 205 F.3d at 613 ("We think the textual arguments about *Nobelman* by themselves require the result we reach today, but we also are unpersuaded by Master Financial's policy arguments . . ."). *See also Bartee* at 11 ("The result we reach today is compelled by consideration of the Bankruptcy Code and the *Nobleman* decision. The policies underlying the mortgage antimodification provisions further bolster our position").

CONCLUSION

As set forth above, and as further validated by the Fifth Circuit's decision in *Bartee*, the Third Circuit's decision in *McDonald* is correct and is supported by the majority view. There is no conflict among the Circuits. In the interests of both justice and judicial economy the Petition of Master Financial, Inc. should by Denied.

Respectfully submitted,

DEXTER K. CASE
Attorney for Respondents
THE LAW FIRM OF
DEXTER K. CASE
541 Court Street
Reading, PA 19601
(610) 372-9900